Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Qwest Communication International Inc.	)	CS Docket No. 97-80
	)	
Petition for Waivers of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1)	)	CSR-7185-Z
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	
	)	
Commercial Availability of Navigation Devices	)	
	)	

Comments of the Consumer Electronics Association
<u>On Qwest Communications Petition for Waiver of Section 76.1204(a)(1)</u>

May 3, 2007

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The Consumer Electronics Association ("CEA") respectfully submits these comments on the Qwest Communications petition for waiver of Section 76.1204(a)(1) of the Commission's rules (the "common reliance rule"). Nine years ago, the Commission determined that the best way to fulfill Congress's mandate to "assure the commercial availability" of competitive navigation devices is to require cable operators to support navigation devices purchased at retail, and later to require operators to rely on the same physically separable conditional access technology that they support for retail devices. The Commission has repeatedly reconfirmed its commitment to this regulatory scheme, most recently with the administrative denial of a waiver to Comcast Communications.[1]

[1] *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7012-Z, Memorandum Opinion and Order (rel. Jan. 10, 2007) ("Comcast Order").

The Court of Appeals for the District of Columbia Circuit has twice rejected challenges to the common reliance rule.[2]

Today, nine years after passage of the rule, the retail market for navigation devices remains "nascent."[3] Yet Qwest now petitions for a further deferral of its common reliance obligation with respect to two video systems, VDSL and FTTH-BPON, based mainly on Qwest's plans to move "within the next few years" to an unspecified "next-generation architecture"[4] – which Qwest does *not* claim will itself satisfy common reliance. The Commission should not grant a waiver based on two technologies which will not promote competition in navigation devices simply to allow Qwest to transition to speculative technologies which themselves may keep subscribers tied to Qwest for the provision of navigation equipment. Furthermore, the other grounds Qwest advances in support of a waiver have already been rejected in the action re Comcast of January 10, 2007.[5] Qwest's petition should be denied.

A. Transition To A Speculative, Noncompliant Technology Is Not A "Special Circumstance" That Justifies a Waiver.

Qwest asks for a "temporary" (though not explicitly time-limited) waiver in order to continue supplying security-integrated set-top boxes during an open-ended transitional period. However, Qwest does not even suggest that either technology to which it intends to migrate (a "DSL-based delivery architecture[]" or a "next generation" FTTH

[2] *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter Communs., Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).
[3] *Commercial Availability of Navigation Devices*, Second Report And Order, CS Docket No. 97-80 ¶ 28 (rel. Mar. 17, 2005).
[4] *Commercial Availability of Navigation Devices*, CS Docket 97-80, CSR-7185-Z, Qwest's Petition for Waivers of the Set-Top Box Integration Ban, 47 C.F.R. § 1204(a)(1) at 2 (Feb. 9, 2007) ("Qwest Petition").
[5] *See* Comcast Order at 8-15.

architecture)[6] will itself be non-integrated and support a nationwide market for competitive devices. This plan, therefore, cannot be a "special circumstance" that justifies an exemption from common reliance.

For one of the technologies discussed in Qwest's petition, "Qwest understands that there will be compliant boxes available for purchase."[7] For that technology, FTTH-BPON, Qwest's only "special circumstance" is that it would rather not incur the expense of compliance with the rule. Requesting a waiver solely to avoid the cost of compliance is tantamount to challenging the common reliance rule in its entirety. This is inappropriate in the waiver context -- especially when a federal appeals court has already heard and rejected two such challenges.

Nor is Qwest in any sort of emergency that could be called a "special circumstance." Cable operators and new video service providers alike have now had nine years' notice of the requirements of Section 76.1204(a)(1), and over eight months since the appeals court rejected cable's last challenge to the rule. Qwest's desire to avoid the effect of the July 1, 2007 deadline, not filed until the same year as the deadline occurs, hardly qualifies as an emergency.

B. <u>The Public Interest Favors Denying a Waiver.</u>

Qwest cannot articulate any real public interest benefit from the grant of a waiver. Any benefits from Qwest's continued ability to deploy new security-integrated set-top boxes is outweighed by harm to the public interest in a robust, competitive market for navigation devices at retail. Because that goal is set out specifically in statute, it cannot be sacrificed for the benefit of potential competition among MPVDs.

[6] Qwest Petition at 2; *see also* Qwest Petition at 7-12.
[7] *Id.*

Regarding VDSL, Qwest notes that, due to the nature of an entirely switched system, its "conditional access" elements might be considered compliant already. If that be the case, Qwest should make and support such an assertion via appropriate documentation for the record, on which there would be an opportunity for public comment. Despite this regulation having been "on the books" for almost nine years, this has never occurred. CEA cannot possibly support such a conclusion in the absence of some record on which it and its members could comment as members of the public.

Qwest observes that "there is not sufficient market incentive for anyone else to develop such a [non-integrated] box." However, granting a waiver will eliminate whatever market incentive does exist for IP-based solutions that otherwise could support a nationwide competitive market in retail devices, as Congress intended. Once the common reliance rule operates to make a competitive retail market viable, if this waiver is granted, Qwest's video customers will be denied the range of choice in access devices available to cable subscribers.

The remaining "public interest" assertion is that a waiver "will [] enable Qwest to focus its limited video services resources on development and deployment of a new delivery system that will permit enhanced video services for customers."[8] Cable operators have been calling up this "diversion of resources" argument since 1998. It has never been a valid justification. Qwest has chosen to provide video service with knowledge of this regulation. Qwest in particular cannot justify a "new entrant" waiver via a plan to *exit* the use of a technology as to which the waiver is sought.

[8] Qwest Petition at 2.

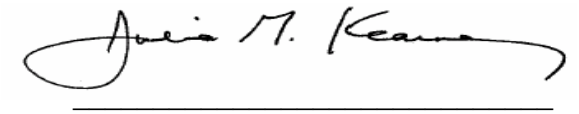
C. A Waiver Is Not Necessary To the Introduction of Any New Service.

The Commission has already determined that when digital features such as the ones cited by the Petitioner are "already offered to [an operator's] entire customer base," a waiver is not "necessary to assist the development or introduction" of new services.[9] Qwest already offers all-digital video services, including one for which compliant non-integrated boxes *are available* or soon will be. Accordingly, and consistent with the order denying Comcast's waiver petition, Qwest has not shown that a waiver is "necessary." The standard under Section 629 of the Telecommunications Act and the Comcast Order is one of actual necessity, not mere benefit.

Conclusion

Advances in video technology will benefit all consumers, but those benefits should not – and need not – carry the cost of reduced competition, and continued cable operator control over the navigation device market. For these reasons, the Commission should deny Qwest's petition.

Respectfully submitted,



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[9] Comcast Order at 9, ¶ 17.

CERTIFICATE OF SERVICE

I do hereby certify that on May 3, 2007 I caused a true and correct copy of the foregoing Comments of the Consumer Electronics Association on the Qwest Communications International, Inc. Petition for Waiver of 47 C.F.R. § 76.1204(a)(1) to be served via overnight mail on the following:

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